

**APPEAL TRIBUNAL DECISION**

**Docket number:** 20 0719 **Hearing date:** June 29, 2020

**CLAIMANT: DETS:**

PAUL RASMUSSEN BENEFIT PAYMENT CONTROL UNIT

11623 LOVELAND CIR PO BOX 115505

EAGLE RIVER, AK 99577-8001 JUNEAU, AK 99811-5505

**CLAIMANT APPEARANCES: DETS APPEARANCES:**

Paul Rasmussen None

####  CASE HISTORY AND FINDINGS OF FACT

The claimant filed an appeal against a March 16, 2020 determination that denied benefits under AS 23.20.360 and AS 23.20.387 on the grounds that the claimant intentionally misrepresented his earnings. The Division mailed the determination to the claimant’s address of record on March 17, 2020. The claimant’s appeal was filed on May 28, 2020, giving rise to the issue of the timeliness of the claimant’s appeal.

The claimant did not receive the determination under appeal. He had moved away from the address the determination was mailed to at the end of January 2020. He had left a forwarding address, but both he and his father, whose residence the determination was mailed to, had problems receiving mail forwarded from the address by the Post Office. The claimant was not claiming benefits at the time the determination was issued, so he did not update his address with the Division.

The claimant contacted the Division in early April 2020 because he had been laid off of work. He was advised that a determination had been issued that denied his benefits, but he was not advised of the extent of the penalty imposed or of his appeal rights. He was advised to continue to file for benefits. The claimant’s benefits were denied each time he filed a claim, because the determination under appeal disqualified the claimant from receiving benefits through July 18, 2020 as a penalty. The claimant was advised of the determination’s effect on his benefit eligibility and advised of his appeal rights on May 28, 2020, after trying to get through to the Division by phone for an extended period. The claimant filed his appeal at that time.

#### PROVISIONS OF LAW

**AS 23.20.340 provides in part;**

 (e) The claimant may file an appeal from an initial determination or a redetermination under (b) of this section not later than 30 days after the claimant is notified in person of the determination or redetermination or not later than 30 days after the date the determination or redetermination is mailed to the claimant's last address of record. The period for filing an appeal may be extended for a reasonable period if the claimant shows that the application was delayed as a result of circumstances beyond the claimant's control.

(f) If a determination of disqualification under AS 23.20.360, 23.20.362, 23.20.375, 23.20.378 ‑ 23.20.387, or 23.20.505 is made, the claimant shall be promptly notified of the determination and the reasons for it. The claimant and other interested parties as defined by regulations of the department may appeal the determination in the same manner prescribed in this chapter for appeals of initial determinations and redeterminations. Benefits may not be paid while a determination is being appealed for any week for which the determination of disqualification was made. However, if a decision on the appeal allows benefits to the claimant, those benefits must be paid promptly.

**8 AAC 85.151 provides in part;**

1. An appeal may be filed with a referee, at any employment center, or at the central office of the division and, if filed in person, must be made on forms provided by the division. An appeal must be filed within 30 days after the determination or redetermination is personally delivered to the claimant or not later than 30 days after the date the determination or redetermination is mailed to the claimant’s last address of record. The 30-day time period will be computed under Rule 6 of the Rules of Civil Procedure. However, the 30-day period may be extended for a reasonable time if the claimant shows that the failure to file within this period was the result of circumstances beyond his or her control.

#### CONCLUSION

An appellant has the burden to establish some circumstance beyond the appellant’s control prevented the timely filing of the appeal.

*Once a notice has been properly mailed to an individual's last known address, the Department has discharged its "notice" obligation. The appellant's asserted failure to receive the notice does not establish cause for an extension of the appeal period. Andrews, Com. Dec. 76H-167, Oct. 8, 1976; aff'd Andrews v. State Dept. of Labor, No. 76-942 Civ. (Alaska Super. Ct. 1st J.D., April 13, 1977). There is a rebuttable*

*presumption that a notice placed in the mail will be timely delivered. Rosser, Com. Dec. 83H-UI-145, June 15, 1983.*

The claimant in this case has overcome the presumption that the notice was delivered to him timely, as he had moved and he had problems receiving forwarded mail from the Post Office. The claimant contacted the Division, likely within the 30-day appeal period, but he was not advised that he could appeal or even that the determination would deny him benefits through July 18, 2020.

*When a claimant approaches an unemployment insurance representative for instructions, it is the responsibility of that representative to provide complete and accurate information regarding the claimant’s request. Murphy, Com. Dec. No 87H-UI-283, September 29, 1987.*

The Tribunal finds the claimant’s appeal was delayed by circumstances beyond his control when he was not advised of his right to appeal in early April 2020.

#### DECISION

The claimant’s appeal from the notice of determination issued on March 16, 2020 is **ACCEPTED** as timely filed.

**CASE HISTORY**

The determination issued March 16, 2020 reduced the claimant’s benefits under AS 23.20.360, denied benefits under AS 23.20.387, and held the claimant liable for the repayment of benefits and the payment of a penalty under AS 23.20.390.

The issues before the Tribunal are whether the claimant:

* earned wages during the weeks claimed;
* knowingly made a false statement or misrepresentation in connection with the claim; and
* is liable for the repayment of benefits and the payment of a penalty.

**FINDINGS OF FACT**

The claimant established a claim for unemployment insurance benefits effective October 20, 2019. The Division requested information from Asbury Management Services, LLC about the claimant’s hours and earnings during weeks in which the claimant had claimed benefits. The employer reported the claimant had started work on January 16, 2020 and was paid $8.56 per hour. The employer reported the claimant worked 14 hours in the first week, 50.23 hours in the second week, and 46.32 hours in the third week. The Division compared the employer’s report with the earnings reported by the claimant when he claimed benefits. The amounts reported by the employer and by the claimant are listed on the table below:

|  |  |  |
| --- | --- | --- |
| **Week Ending** | **Employer****Reported** | **Claimant****Reported** |
| January 18, 2020 | $300 | $0.00 |
| January 25, 2020 | $750 | $0.00 |
| February 1, 2020 | $750 | $0.00 |

The claimant had been offered an unpaid working interview by the employer along with three other people for a period of one to two weeks. The understanding was that the successful candidate would be offered the position of service writer at the end of the working interview. The claimant did not keep track of his time spent on the employer’s premises during the weeks under review. He did not submit a time report of any kind. He does not know how the employer tracked the hours that were reported to the Division. The claimant recalled that he spent far less time each day at the employer’s premises during the interview process than what was reported. The claimant recalled that he was searching for other work during that time as well as other activities and could not have done so if he was working over ten hours per day as was reported by the employer. The claimant does not believe he would spend the time reported by the employer on the interview process when he believed he was not being paid for the time.

The claimant was offered and accepted the position on February 1 or 2, 2020. The claimant did not note when he received his paycheck for his first week officially on the job that he had been paid for the interview period. He did note when he received his second week’s paycheck that it was considerably less. He was working on commission only at that time and his commissions were not broken down on his pay stubs. The claimant would have to request a breakdown from the employer to see what he had been paid for. The claimant was not concerned that the employer had paid him more than he expected initially and he did not question it further because he was working long hours at a new job and he had ceased filing for unemployment benefits. The claimant was not aware he had been paid for the interview process until he received the determination under appeal.

**PROVISIONS OF LAW**

**AS 23.20.360. Earnings deducted from weekly benefit amount.**

The amount of benefits, excluding the allowance for dependents, payable to an insured worker for a week of unemployment shall be reduced by 75 percent of the wages payable to the insured worker for that week that are in excess of $50. However, the amount of benefits may not be reduced below zero. If the benefit is not a multiple of $1, it is computed to the next higher multiple of $1. If the benefit is zero, no allowance for dependents is payable.

**AS 23.20.387. Disqualification for misrepresentation.**

(a) An insured worker is disqualified for benefits for the week with respect to which the false statement or misrepresentation was made and for an additional period of not less than six weeks or more than 52 weeks if the department determines that the insured worker has knowingly made a false statement or misrepresentation of a material fact or knowingly failed to report a material fact with intent to obtain or increase benefits under this chapter. The length of the additional disqualification and the beginning date of that disqualification shall be determined by the department according to the circumstances in each case.

(b) A person may not be disqualified from receiving benefits under this section unless there is documented evidence that the person has made a false statement or a misrepresentation as to a material fact or has failed to disclose a material fact. Before a determination of fraudulent misrepresentation or nondisclosure may be made, there must be a preponderance of evidence of an intention to defraud, and the false statement or misrepresentation must be shown to be knowing and to involve a material fact.

**AS 23.20.390. Recovery of improper payments; penalty.**

(a) An individual who receives a sum as benefits from the unemployment compensation fund when not entitled to it under this chapter is liable to the fund for the sum improperly paid to the individual.

(f) In addition to the liability under (a) of this section for the amount of benefits improperly paid, an individual who is disqualified from receipt of benefits under AS 23.20.387 is liable to the department for a penalty in an amount equal to 50 percent of the benefits that were obtained by knowingly making a false statement or misrepresenting a material fact, or knowingly failing to report a material fact, with the intent to obtain or increase benefits under this chapter. The department may, under regulations adopted under this chapter, waive the collection of a penalty under this section. The department shall deposit into the general fund the penalty that it collects.

# CONCLUSION

The first issue is whether the claimant worked and earned wages for the weeks in question. Under AS 23.20.360, the benefits that a person is entitled to receive must be reduced by the amount of wages a person earns. The amount of the deduction is figured using the formula found within the statute. The claimant was paid for the interview process during the weeks under review by Asbury Management Services, LLC. The claimant’s benefits must be reduced accordingly.

The second issue is whether the claimant knowingly made a false statement or misrepresentation in connection with the claim.

*A presumption of intent to defraud arises on the basis of a falsified claim instrument itself. The division's claim form has but one purpose. It is the instrument executed by an individual desirous of receiving unemployment insurance benefits for a specific week. To this end, it contains clear and unambiguous language detailing the material factors upon which the division will base its decision to pay or not to pay. In addition, the individual completing the form certifies as to the truth of the answers and as to his understanding that legal penalties otherwise apply. Thus, once established that a claim instrument has been falsified, the burden of proof shifts to the individual [to establish there was no intent to defraud.] Morton, Com. Dec. 79H-149, 9/14/79.*

The claimant reported to the Division that he did not work in the weeks under review because he did not believe he had worked and he was told he would not be paid for the interview process that took place during the weeks under review. He was not aware he had been paid for the interview time after he accepted the position. He believes he spent significantly less time in the interview process than the employer reported. The Tribunal cannot conclude that the claimant intentionally misrepresented his earnings in the week under review.

The third issue is whether the claimant is liable for the repayment of benefits and the payment of a penalty. AS 23.20.390 states an individual who receives a sum as benefits from the unemployment compensation fund when not entitled to it under this chapter is liable to the fund for the sum improperly paid to the individual. In addition to the liability under (a) of this section for the amount of benefits improperly paid, an individual who is disqualified from receipt of benefits under AS 23.20.387 is liable to the department for a penalty in an amount equal to 50 percent of the benefits that were obtained by knowingly making a false statement or misrepresenting a material fact, or knowingly failing to report a material fact, with the intent to obtain or increase benefits.

The evidence presented shows that the claimant received benefits to which he was not entitled but does show that he intentionally misrepresented his eligibility in order to receive benefits. The Tribunal holds that the claimant is liable to the fund the amount of benefits he received to which he was not entitled, but he is not subject to a penalty.

 **DECISION**

The notice of determination and determination of liability issued in this matter on March 16, 2020 is **MODIFIED**.

* That portion of the determination holding that the claimant’s benefits are reduced due to receipt of wages is **AFFIRMED**. Benefits remain reduced under AS 23.20.360 for the weeks ending January 18, 2020, January 25, 2020 and February 1, 2020.
* That portion of the determination holding that the claimant committed fraud or intentional misrepresentation is **REVERSED**. A disqualification under AS 23.20.387 is not imposed and benefits are allowed for the weeks ending January 18, 2020, January 25, 2020 and February 1, 2020 and March 21, 2020 through July 18, 2020, if the claimant is otherwise eligible.
* That portion of the determination holding that the claimant is liable for the repayment of benefits and for the payment of a penalty is **MODIFIED**. The claimant remains liable to the fund for benefits he received to which he was not entitled, but not for payment of a penalty.

#### APPEAL RIGHTS

This decision is final unless an appeal is filed to the Commissioner of Labor and Workforce Development within **30 days** after the decision is mailed to each party. The appeal period may be extended only if the appeal is delayed for circumstances beyond the party's control. A statement of appeal rights and procedures is enclosed.

Dated and mailed on July 9, 2020.

 Rhonda Buness, Appeals Officer